Opinion of the United States Court of Appeals For the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-2796

No. 72-2800

UNITED STATES OF AMERICA,

Petitioner-Appellant,

—v.—

MARTIN LINEN SUPPLY COMPANY,
TEXAS SANITARY TOWEL SUPPLY CORP.,
and WILLIAM B. TROY,

Respondents-Appellees.

Appeals from the United States District Court for the Western District of Texas

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(October 9, 1973)

Before:

THORNBERRY, AINSWORTH and RONEY,

Circuit Judges.

RONEY, *Circuit Judge:*

This is an appeal from orders of the District Court resulting in the dismissal before trial of civil and criminal contempt petitions brought by the United States charging violations of a final judgment in a civil antitrust action.

Contrary to the argument of the respondents, we hold that we have appellate jurisdiction to review these orders which we reverse on the ground that the conduct charged in the petitions could constitute a violation of the antitrust decree.

The antitrust judgment, a consent decree, prohibited each corporate defendant linen supplier[1] (collectively referred to herein as "Martin"), from threatening, coercing, inducing or attempting to induce any linen rental supplier to refrain from furnishing linen supplies to any customer. The contempt argument centers on the interpretation and subsequent application to be given this prohibition in relation to Martin's alleged activities.

The appellate jurisdiction problem is difficult. Under the Expediting Act, the Supreme Court has exclusive jurisdiction of appeals from final judgments in every civil action wherein the United States is complainant.[2] Under the Criminal Appeals Act, the Court of Appeals has jurisdiction in a criminal case to review a decision, judgment or order dismissing an indictment or information except where

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[1] The corporate defendants include Martin Linen Co. and Texas Sanitary Towel Supply Corp. (Cascade Linen Service). Tex-Mart Corp., which had been named as a defendant in the original complaint and consent decree, was not named as respondent in the petitions. Respondent William B. Troy is included because he is the controlling stockholder and president of both Martin Linen Supply and Cascade Linen Service.

[2] Section 2 of the Expediting Act, as amended (15 U.S.C.A. § 29) provides:

> In every civil action brought in any district court of the United States under [the antitrust laws], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

Tidewater Oil v. *United States*, 409 U.S. 151 (1972).

the double jeopardy clause of the Constitution prohibits further prosecution. A criminal contempt prosecution in an antitrust case has been held to be a "criminal case" within the meaning of 18 U.S.C.A. § 3731.[3] *United States* v. *Goldman*, 277 U.S. 229 (1928).

At bar is an appeal from a criminal contempt proceeding over which we have review jurisdiction, and an appeal from a civil contempt proceeding which, standing alone, is beyond our jurisdiction To further complicate the jurisdictional picture, the District Court entered a separate order "construing" the final antitrust judgment in the civil suit. Although Martin contends that this construction order was a "final judgment" within the Expediting Act, thereby precluding review by our Court, we reason that the construction order is actually a part of the contempt proceedings and should be handled in the same manner as if it were a ruling within the context of a contempt proceeding. Since we have jurisdiction over the criminal contempt appeal, we will additionally review the civil contempt appeal on the rationale of judicial economy found in cross-claim, pendant and ancillary jurisdiction. To hold otherwise would require the same parties to litigate basically the same issues in two different courts at the same time.

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[3] 18 U.S.C.A. § 3731 states

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more courts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution. . . .
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> The provisions of this section shall be liberally construed to effectuate its purposes.

Opinion of the United States Court of Appeals For the Fifth Circuit

The Proceedings Below

In 1969, the United States filed a civil complaint in the District Court alleging that Martin restrained trade in violation of the Sherman Act, 15 U.S.C.A. § 1 *et seq.*, with respect to the business of furnishing linen supplies in the state of Texas. In June, 1969, after negotiation, a consent decree was entered as final judgment in the suit.

In December, 1971, the United States filed the separate civil and criminal contempt petitions under review alleging violations of Section V(A)(1) of the consent decree. That Section provides

> Each corporate defendant is enjoined and restrained from, directly or indirectly:
>
> (A) threatening, coercing, inducing or attempting to induce:
>
> (1) Any linen rental supplier to refrain while in business, from furnishing linen supplies to any customer . . . .

The activities which the Government allege violated the consent decree revolve around Martin's attempts to exact reciprocal agreements from other linen suppliers not to compete for Martin's customers, backed up by warnings of economic reprisals.

After full pre-trial discovery, Martin filed a petition in the original antitrust proceeding for construction of the above Section.[4] The District Court determined that the

[4] Jurisdiction was retained under Section X of the consent decree:

> Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at

allegations by the Government centered on Martin's activities aimed at recoupment of its own former customers and retaliations against competitors who solicited its customers. The Court concluded that Section V(A)(1) of the consent decree does not prevent Martin from threatening competitors with economic reprisals to persuade them to refrain from soliciting Martin's customers.[5]

Subsequent to the entry of the construction order and based thereon, the District Court dismissed the criminal and civil contempt petitions against Martin.

The Construction Order

Martin contends that the construction order interpreting a provision of the antitrust consent decree was a final judgment in a civil action and that, since the United States was the complainant, appeal lies only to the Supreme Court under the Expediting Act. The construction order,

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any time for such further orders or directions as may be necessary or appropriate for the construction or the carrying out of this Final Judgment, for the modification or termination of any of the provisions hereof for the purpose of enabling the plaintiff to apply to this Court for the enforcement of compliance herewith and for the punishment of violations hereof.

[5] Accordingly the Court finds:

1. The provisions of Section V(A)(1) do not prohibit Martin and Cascade from recouping business lost to competitors, from engaging in price wars and retaliatory sales compaigns to effect such recoupment, and from threatening to engage in those activities.

2. None of the activities of Defendants charged as violations of Section V(A)(1) in Paragraphs 10, 11, 12 and 13 of the Contempt Petitions and in the Supplementary Papers, violate the injunctions of that Section.

734 (1963). In a non-jury trial, jeopardy attaches when the court begins hearing evidence. *Hunter* v. *Wade,* 336 U.S. 684 (1949).

The mere arraignment and pleading to an indictment or the conduct of a preliminary examination does not place the defendant in jeopardy. *Collins* v. *Loisel,* 262 U.S. 426, 429 (1923); *Bassing* v. *Cady,* 208 U.S. 386, 391-392 (1908). Nor does the dismissal on a *nolle prosequi* when the witnesses have been sworn but before any have testified. *Newman* v. *United States,* 410 F.2d 259 (D.C. Cir. 1969).

The Supreme Court has admonished us, however, to avoid any rigid rule and evaluate each case according to its facts. *Illinois* v. *Somerville, supra.* Indeed, this Court has noted the absence of fixed rules by which to measure an individual case. *McNeal* v. *Hollowell,* —— F.2d —— (5th Cir. 1973).

In the case at bar the trial was admittedly in the pre-trial stages. It is true that the Government disclosed the nature of its case in the extensive pre-trial procedures ordered by the District Judge, but this did not commence a "hearing" of the evidence. The trial had not yet begun. Martin was never in jeopardy because it is "when the trial commences . . . that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated. . . ." *United States* v. *Jorn, supra,* at 480.

We find the authority relied upon by Martin to be inapplicable. *United States* v. *Findley,* 439 F.2d 970 (1st Cir. 1971), *United States* v. *Ponto,* 454 F.2d 657 (7th Cir. 1971), *United States* v. *Grochowski,* 454 F.2d 655 (7th Cir. 1971),

and *United States* v. *Gustavson,* 454 F.2d 677 (7th Cir. 1971), are "draft act" cases[6] which precluded appeal by the Government. They did not turn on the double jeopardy clause. All of the cases were decided under the Criminal Appeals Act, 18 U.S.C.A. § 3731, prior to its amendment by the Omnibus Crime Control Act of 1970, § 14(a), 84 Stat. 1890. Under the prior act, appeal was limited, not only by the double jeopardy clause, but also by statutory constraints. In deciding *Findley, Ponto, Grochowski,* and *Gustavson,* the Courts relied on these statutory constraints rather than the double jeopardy clause.

The First Circuit stated in *Findley* that the defendant had "[a]dmittedly . . . not formally been put in jeopardy. . . . Collectively we believe this was an approach not in terms of double jeopardy, but in terms of the kind of error section 3731 was intended to cover." 439 F.2d at 973.

The Seventh Circuit in *Ponto,* sitting *en banc,* discussed the applicability of the double jeopardy clause: only three members of the five-judge majority were persuaded that the Constitution barred an appeal. 454 F.2d at 663. The two members of the majority who had concurred in the result on statutory grounds did not join in the opinion on the constitutional grounds. 454 F.2d at 665. The four dissenting judges disagreed on both statutory and constitutional grounds: they felt that the constitutional guarantee against double jeopardy was inapplicable since the trial had not begun and jeopardy had not attached. 454 F.2d at 667-668. A similar distribution in the voting occurred in the companion case. *Gustavson.* There, only seven mem-

[6] Prosecution for refusal to submit to induction under the Military Selective Service Act of 1967, 50 U.S.C.A. App. § 462(a).

bers heard the case *en banc*. Only five expressed an opinion on the double jeopardy issue. Of these, two voted that it barred the appeal and three voted that the clause was inapplicable.

Since the draft act cases were not decided on jeopardy grounds, they do not support Martin's argument that jeopardy has attached in this case.

Civil Contempt Jurisdiction

The civil contempt petition is virtually identical to the criminal contempt petition. Since the dismissal of the criminal contempt petition is appealable to this Court, the civil contempt petition may also be heard here on the basis of judicial economy.[7] *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, 612-618 (1966), is illustrative of the judicial economy reasoning. In that case, the Federal Maritime Commission entered a reparation order directing a carrier to pay damages to a shipper. Both the carrier and the shipper appealed, each intervening in the appeal of the other. The Court of Appeals had jurisdiction to review the shipper's claim for an increase in damages, but did not have jurisdiction over the carrier's appeal which properly lay in the District Court through an enforcement proceeding by the shipper. The Supreme Court held that the Court of Appeals could properly review both appeals.

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[7] The rationale of judicial economy to prevent duplicity in the federal system has precedent in the policy underlying cross-claims, pendant and ancillary jurisdiction. *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 (1926); *Smith Petroleum Service, Inc.* v. *Monsanto Chemical Co.*, 420 F.2d 1103, 1113-1115 (5th Cir. 1970); 2A Moore, Federal Practice, ¶ 8.07 [5] (2d ed. 1972).

> With the jurisdiction of the Court of Appeals properly invoked by the shipper, there is, therefore, every reason to permit the carrier not only to litigate the amount of the reparation order but also to insist upon a determination of the validity of the Commission's order, both with respect to the carrier's violation of the Act and with respect to the reparation award itself. . . . The minimal disadvantages resulting to the shipper from permitting the carrier to attack the reparation order are more than offset by the desirability of a prompt and efficient determination of the validity of the Commission's order. . . . And, once the carrier intervenes in the shipper's appeal, all the parties interested in the complete resolution of the validity of the Commission's order are before the court. In this situation it would make little sense to require the carrier to break off his argument short of its logical conclusion and relitigate it anew before a district court in an enforcement action.

383 U.S. at 616-617.

Consideration of the appeals jointly in the case at bar is supported by the holding in two kinds of cases. First, in cases arising under the former Criminal Appeals Act, the Supreme Court required the Court of Appeals to review both grounds if the District Court's ruling was on alternative grounds, one appealable under the statute to the Supreme Court and the other to the Court of Appeals. *United States* v. *Swift & Co.*, 318 U.S. 442, 444-445 (1943). Second, in cases involving a single order for civil and criminal contempt in which the Supreme Court has held

that the criminal aspect of the order controls for purposes of determining the procedure on appeal. *See Union Tool Co.* v. *Wilson,* 259 U.S. 107, 110 (1922) (cross writ); *In re Merchants' Stock & Grain Co.,* 223 U.S. 639 (1912) (contempt decree containing both remedial and punitive provisions).

Without deciding whether we would have jurisdiction to review the civil contempt proceeding were it standing alone or were it substantially different than the criminal petition, we hold that we have jurisdiction to review the dismissal under the facts of this case.

Contempt Charge

At this juncture it is necessary to review the language of Section V(A)(1) of the consent decree:

> V.
>
> Each corporate defendant is enjoined and restrained from directly or indirectly:
>
> (A) Threatening, coercing, inducing or attempting to induce:
>
> (1) Any linen rental supplier to refrain, while in business, from furnishing linen supplies to any customer . . . .

A consent decree is the manifestation of a negotiated settlement where the defendants in the original suit relinquished their right to litigate the issues of antitrust liability, relying fully on the decree terms. *See United States* v. *Armour,* 402 U.S. 673, 681-683 (1971). It is nec-

essary to look to the consent decree in its entirety to ascertain the meaning of the various sections as intended by the parties. *United States* v. *Atlantic Rfg. Co.*, 360 U.S. 19, 22 (1959). In so doing the trial court and this Court must give weight to the plain meaning of the words used. *United States* v. *Armour, supra* at 682. This caveat works to the protection of both parties.

Relying on the plain meaning of the words, the thrust of Section V(A)(1) is to prohibit Martin from engaging in activity which is aimed at causing any linen supplier to refrain from furnishing linen supplies to any customer. "Causing any linen supplier to refrain" is the key phrase of the section. The method used to procure the forebearance from competition is secondary: threats, coercion, and inducements by Martin are prohibited by V(A)(1) if they are aimed at a competitor with the intent to have that competitor refrain from competing with Martin.

The Government alleged that the following activities were violative of Section V(A)(1):

> threats of recoupment, threats of price wars and threats of retaliatory sales campaigns to induce competitors to enter into reciprocal agreements not to compete for customers, and to refrain from soliciting and taking customers from Martin . . . .

The District Court, after addressing itself to these allegations, held that "soliciting," "competing," and "taking" were not synonymous with "furnishing linen supplies." "Furnishing linen supplies" was limited to delivering linen supplies. By so defining the phrase, none of the activity alleged by the Government was within the prohibition of

Section V(A)(1) since the allegations were not addressed to furnishing linen supplies.

In examining the entire consent decree, however, the word "furnishing" appears in several different sections.[8]

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[8] Section II(c):

"Linen rental supply business" means the business of *furnishing* clean linen supplies;

Section IV:

Each defendant is enjoined and restrained from entering into, adhering to, enforcing or claiming any rights under any contract, agreement, understanding, plan or program with any person, not owned or controlled by such defendant, to directly or indirectly:

(A) Fix, determine, maintain, stabilize or adhere to prices, discounts, or terms or conditions of sale, for the *furnishing* of any linen supplies to any third person:

(B) Divide, allocate or apportion markets, territories or customers for the furnishing of any linen supplies or otherwise restrict competition between or among linen rental suppliers;

(C) Cause any seller of linen supplies to boycott or refuse to sell linen supplies to any linen rental supplier.

Section V(G):

Discussing or exchanging with any linen rental supplier, prices or price lists for the *furnishing* of linen supplies to any customer, or exchanging with, *furnishing* to or receiving from any linen rental supplier or linen rental suppliers, any list of customers or customer accounts served by any linen rental supplier; . . . .

Section VI

Each corporate defendant is enjoined and restrained from *furnishing* or offering or threatening to *furnish* linen supplies to a customer or potential customer on terms or conditions which involve below cost prices, lump sum cash payments to the customer, loans (other than bona fide loans by a defendant to its then existing customers), free service, gratuities or other similar inducements to obtain a contract or renewal of a contract for the *furnishing* of linen supplies, for the purpose or with the effect of eliminating a competitor or competitors.

This repeated use of the words "furnish" or "furnishing" in conjunction with the "linen supplies" indicates that the words are used collectively in this decree to describe the business in which the respondents are engaged. The words "furnish linen supplies" are used in the same manner in Section V(A)(1) and accordingly that section should be interpreted to mean that the defendants are prohibited from using threats, coercion and inducements to persuade their competitors to refrain from "doing business" with any customer.

Next, the District Court looked at the methods alleged by the Government to have been used by Martin. Finding that they centered on recoupment and retaliation, the Court stated that Martin may recoup business lost to competitors "by any means, including below cost prices, lump sum cash payments, loans, free services, gratuities and other inducements. . . ." It was a simple step for the Court to conclude that Martin "may also say, in advance, that they will engage in these same activities. The speculative effect of verbalization cannot be different than that of the deeds verbalized." As a consequence of this reasoning, the District Court found:

> 1. The provisions of Section V(A)(1) do not prohibit Martin and Cascade from recouping business lost to competitors, from engaging in price wars and retaliatory sales campaigns to effect such recoupment, and from threatening to engage in those activities.

The activities of recoupment and retaliation are not *per se* violations of Section V(A)(1). They are violations,

however, if their announced purpose is to cause Martin's competitors to refrain from competing, since the Section prohibits activities which "directly or indirectly" attempt "to induce" competitors *"to refrain"* from doing business.

It may be acceptable, as the District Court found, for Martin to engage in activity to recoup business. There is a difference, however, in activities of recoupment aimed at the customers and the threats of recoupment aimed at the competitors. We are mindful of the fact that recoupment practices may have the side effect of discouraging competition. Such flows from the normal course of business. But the use of threats directed at competitors to restrain competition, or to obtain reciprocal noncompetitive agreements, as the Government alleges, goes to the heart of the antitrust problem. Such activity was recognized and prohibited by Section V(A)(1).

The District Court concluded that the alleged activities by Martin against competitors were unsuccessful. The Court accepted tables submitted by Martin "showing that for more than three years there has been a constant interchange of accounts between Martin . . . and some one hundred competitors in the State of Texas." This information is dispositive of the issue: it is irrelevant under Section V(A)(1) whether or not Martin's competitors were actually induced to refrain from competing. The issue is whether Martin either directly or indirectly threatened, coerced, induced, or attempted to induce such action.

Assuming that the allegations by the Government in the contempt petitions and supplementary papers are factually true, Martin attempted to engage other linen suppliers in noncompetitive agreements and attempted to cur-

tail competition under threats, coercion and inducements of retaliatory sales campaigns. Such alleged activity aimed at restraining competition is a *prima facie* violation of Section V(A)(1).

We have only assumed, as did the District Court, that the allegations are true. The District Court must now address the factual issues in the case. We remand for such purpose.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

Civil Action No. SA-69-CA-114

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

MARTIN LINEN SUPPLY COMPANY; TEX-MART CORP.; TEXAS SANITARY TOWEL SUPPLY CORP., and WILLIAM B. TROY,

Defendants.

Memorandum Opinion and Order

Three Defendants have applied for construction of a single section of the Final Judgment ("Judgment") entered in this civil antitrust action upon consent of the parties on June 2, 1969. They move under Section X thereof which provides:

"X.

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or the carrying out of this Final Judgment, for the modification or termination of any of the provisions hereof for the purpose of enabling the plaintiff to apply to this Court for the enforcement of com-

pliance herewith and for the punishment of violations hereof."

The application is made at this time because of the pendency of criminal and civil contempt proceedings charging that the applying Defendants, MARTIN LINEN SUPPLY COMPANY ("Martin"), TEXAS SANITARY TOWEL SUPPLY CORP. ("Cascade") and WILLIAM B. TROY, President of Martin and Cascade, have wilfully, deliberately and contumaciously violated certain of the provisions of the Judgment.

The principal charge in the Criminal and Civil Contempt Petitions is stated in Paragraph 10 of each Petition. That Paragraph asserts that applying Defendants "have knowingly and wilfully violated Section V(A)(1) of the Judgment by threatening, coercing, inducing and attempting to induce competitors to refrain from soliciting business from linen supply customers of Martin and Cascade, by conducting retaliatory sales campaigns and threatening such campaigns as hereinafter described." Paragraphs 11, 12 and 13 of the Petitions allege specific conduct embraced within the foregoing general charge. This specification of conduct has been expanded and stated in more detail by Plaintiff during the course of pre-trial proceedings in "Answers of United States of America to Interrogatories and Request for Production of Documents by Respondents," "Bill of Particulars" and "Supplement to Voluntary Bill of Particulars" ("Supplementary Papers").

The nature of the conduct the petitions describe as violative of Section V(A)(1) is summarized in Paragraph 11 of each Petition which reads as follows:

"11. In furtherance of their efforts to threaten, coerce, and induce competitors to refrain from soliciting business from linen rental users who are customers of

claimed to be violative of Section V(A)(1) to threats of recoupment, threats of price wars and threats of retaliatory sales campaign, Plaintiff added still one more concept to its view of the scope of Section V(A)(1). The final position taken by Plaintiff on this application is that Martin and Cascade by seeking to exact from their customers reciprocal agreements not to compete for customers, backed up by warnings of economic reprisals, violate the letter and purpose of Section V(A)(1) of the Judgment.

The principles of construction the Court must follow here are time honored and clear. They have been restated by the Supreme Court most recently in *United States* v. *Armour Co.* 402 U.S. 673 (1971).

At the outset we must remember that the Court has before it for construction a provision of a final judgment formulated in the course of negotiations between the parties and entered on their consent. In those negotiations Defendants have bargained away their Constitutional right to litigate the issues of antitrust liability relying fully on the Judgment terms to which they have agreed.[1] The Second Circuit has noted: "It is important to the obtaining of consent decrees, on which the effective enforcement of the antitrust laws depend in no small degree, that the defendants who sign them should know that these will not be stretched beyond their terms."[2]

If the language of Section V(A)(1), standing alone, is clear and unambiguous the reach of that Section must be determined solely from the words in which its provisions

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[1] *Armour, supra,* at p.682.

[2] *United States* v. *American Society of Composers, Authors & Publishers,* 331 F.2d 117, 123-124 (2nd Cir. 1964) cert. den., 377 U.S. 977 (1964).

are couched.[3] Those words specifically enjoin defendants from threatening, coercing, inducing or attempting to induce a competitor to refrain, while in business, *from furnishing linen supplies to any customer*. Plaintiff urges the Court to find that the emphasized phrase prohibits Martin and Cascade from utilizing unilateral threats of recoupment, threats of price wars and threats of retaliatory sales campaigns to induce competitors to enter into reciprocal agreements not to compete for customers, and to refrain from soliciting and taking customers from Martin and Cascade. The Court can so find only if in ordinary usage and common understanding "competing," "soliciting" and "taking" are synonymous with "furnishing." They are not so synonymous.

In relation to customers, the word "furnish" is the equivalent of "serve". It means to provide, supply or give service to. There is nothing in any dictionary or other definition of "furnishing" to suggest that "furnishing linen supplies" is a broader term embracing the additional unrelated concepts of soliciting linen supply customers, competing for linen supply customers or taking linen supply customers. "Solicit," with respect to any customer, means canvass, court, woo, seek and bid for. With respect to customers "compete" means to vie for or enter into competition with a business rival for. "Take," with respect to customers, is a synonym for acquire, get, obtain, secure and procure. All of the activities signified by these latter terms are distinct from and far beyond the scope of the limited conduct described by the word "furnishing". Had the parties intended by the provisions of Section V(A)(1) to formulate an injunction against in-

[3] *Armour, supra,* at p.682.

ducing or threatening to induce competitors to refrain from soliciting the customers of Martin and Cascade; or to refrain from competing with Martin and Cascade for the business of their customers; or to refrain from taking customers away from Martin and Cascade, there are words other than "furnishing" which they could have used to express any such intention clearly and unmistakeably. The parties used none of those words. The Court may not stretch "furnishing" beyond its ordinary and generally understood meaning to embrace the different and distinct conduct Plaintiff would like to read into that term. "If the parties had agreed to such a prohibition they could have chosen language that would have established the sort of prohibition the Government now seeks".[4]

When Section V(A)(1) is read together with Section VI it is apparent that the former does not prohibit unilateral threats by Martin and Cascade to recoup by any means, including below cost prices, lump sum cash payments, loans, free service, gratuities and other inducements, business these firms lose to competitors.

Defendants have presented in the Affidavit of Mervin C. Pollak, Esq. the evolution in negotiation of the provisions of Section V(A)(1). Plaintiff has argued against, but has not refuted, the facts alleged in that Affidavit. The Court is concerned with this evolution only to the extent that it shows Section V(A)(1) did have a specific and limited purpose and that this purpose was different from that now urged by Plaintiff.

There can be no distinction in fact between the information conveyed to competitors by a general unilaterally followed policy of recoupment and retaliation and a public

[4] *Armour, supra,* p.681.

or private communication of that policy. Since Plaintiff has conceded that Martin and Cascade may properly engage in these competitive activities originally claimed by Plaintiff to be violations of Section V(A)(1) because of their theoretical, coercive and inhibiting effect on competitors, it is clear that Cascade and Martin may also say, in advance, that they will engage in these same activities. The speculative effect of verbalization cannot be different than that of the deeds verbalized.

Plaintiff has admitted in its briefs on this application that in fact the competitors of Martin and Cascade have not been dissuaded by any of the practices charged from continuing to compete with Martin and Cascade. Defendants have submitted undisputed figures showing that for more than three years there has been a constant interchange of accounts between Martin and Cascade and some one hundred competitors in the State of Texas. This is a strong picture of competition which belies the curtailment of competition Plaintiff fears theoretically could result from the recoupment and retaliatory threats charged against Martin and Cascade.

For these practical reasons the Court's inability to find in the provisions of Section V(A)(1) the prohibitions Plaintiff would like to find there does no violence to antitrust principles. It has long been basic that inquiry into antitrust legality is not mechanical or artificial. *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344, 360 (1933). All such inquiry is directed at the substance of challenged conduct, not its form. *United States* v. *Masonite Corp.,* 316 U.S. 265, 278 (1942).

If Defendants were to be hampered by the restrictions Plaintiff seeks to impose upon their competitive conduct

under Section V(A)(1) they would soon be marked for extinction by predatory competitors, including those aggressive enough to lodge the complaints on which Plaintiff has acted in the contempt proceedings. Effective competition from Martin and Cascade would be eliminated and public users of linen rental service in Texas would suffer from that elimination. No antitrust judgment should be construed to have such an antitcompetitive effect unless the clear and unavoidable mandate of its language leaves a Court with no other choice and no alternative construction. Section V(A)(1) has no such compelling mandate.

It is fundamental that the provisions of Section V(A)(1) represent "an agreement by the parties which the Court cannot expand or contract." [5] With Mr. Justice Marshall the Court here is compelled to say that even if the construction sought by Plaintiff *were* "in keeping with the purposes of the antitrust laws, we do not believe it is supported by the terms of the consent decree under which it is sought." [6] In *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959) the Supreme Court declined, under the guise of interpretation, to substantially change a decree "to which the parties consented without adjudication of the issues" [7] merely because "another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place." [8]

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[5] See *Artvale, Inc.* v. *Rugby Fabrics Corp.*, 303 F. 2d 283, 284 (2nd Cir., 1962).

[6] *Armour, supra,* at p.683.

[7] *Atlantic, supra,* at p.23.

[8] *Id.* at p.24.

Accordingly the Court finds:

1. The provisions of Section V(A)(1) do not prohibit Martin and Cascade from recouping business lost to competitors, from engaging in price wars and retaliatory sales campaigns to effect such recoupment, and from threatening to engage in those activities.

2. None of the activities of Defendants charged as violations of Section V(A)(1) in Paragraphs 10, 11, 12 and 13 of the Contempt Petitions and in the Supplementary Papers, violate the injunctions of that Section.

IT IS SO ORDERED

ENTERED this 18th day of May, 1972, at Midland, Texas.

JOHN H. WOOD, JR.
United States District Judge

Order

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

Criminal No. SA-71-CR-419

Civil No. SA-69-CA-114

(Civil and Criminal Contempt Petitions)

UNITED STATES OF AMERICA

—v.—

MARTIN LINEN SUPPLY COMPANY,
TEXAS SANITARY TOWEL SUPPLY CORP.,
and WILLIAM B. TROY

In accordance with this Court's Memorandum Opinion dated May 18, 1972 in Civil Action No. SA-69-CA-114, it is ordered that the charges of violations of Section V(A) (1) of the Judgment in SA-69-CA-114 contained in Paragraphs 10, 11, 12 and 13 of the above-captioned Criminal and Civil Contempt Petitions and the Supplementary Papers referred to in the aforesaid opinion, are hereby DISMISSED with prejudice.

The Court, having also considered Petitioner's Application for Leave of Court to Dismiss the Remaining Counts of the Contempt Petitions, is of the opinion that said request should be GRANTED and that Petitioner be permitted to file a dismissal without prejudice of all charges in the above-captioned contempt actions remaining after dismissal

of the charges contained in Paragraphs 10, 11, 12, and 13 of the Contempt Petitions.

It is so ORDERED.

ENTERED this 12th day of June, 1972 at San Antonio, Texas.

/s/ JOHN H. WOOD, JR.
John H. Wood, Jr.
United States District Judge

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-2796

D. C. Docket No. CA 69-SA-114

UNITED STATES OF AMERICA

Petitioner-Appellant,

—versus—

MARTIN LINEN SUPPLY COMPANY, TEXAS SANITARY TOWEL SUPPLY CORP., and WILLIAM B. TROY,

Respondents-Appellees.

Appeal from the United States District Court for the Western District of Texas

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Before:

THORNBERRY, AINSWORTH and RONEY,

Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

Judgment

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that respondents-appellees pay to petitioner-appellant the costs on appeal to be taxed by the Clerk of this Court.

October 9, 1973

Issued as Mandate: October 31, 1973

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-2800

D. C. Docket No. CR-71-SA-419

UNITED STATES OF AMERICA

Petitioner-Appellant,

—versus—

MARTIN LINEN SUPPLY COMPANY, TEXAS SANITARY TOWEL SUPPLY CORP., and WILLIAM B. TROY,

Respondents-Appellees.

Appeal from the United States District Court for the Western District of Texas

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Before:

THORNBERRY, AINSWORTH and RONEY,

Circuit Judges.

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October 9, 1973

Issued as Mandate: October 31, 1973

No. 73-743

JAN 22 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

MARTIN LINEN SUPPLY COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

THOMAS E. KAUPER,
Assistant Attorney General,

CARL D. LAWSON,
IRWIN A. SEIBEL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 485 F. 2d 1143. The opinion of the district court (Pet. App. 18a-27a) is not officially reported.

JURISDICTION

The judgments of the court of appeals (Pet. App. 30a-33a) were entered on October 9, 1973. The petition for a writ of certiorari was filed on November 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether under the Criminal Appeals Act (18 U.S.C. 3731), which authorizes an appeal by the gov-

ernment "except * * * where the double jeopardy clause * * * prohibits further prosecution," an appeal by the government is permitted from a dismissal by a district court, before the commencement of trial, of criminal contempt charges, when such dismissal is based upon the sufficiency of the allegations contained in the contempt petition, as particularized by pre-trial discovery pleadings.

2. Whether, when a district court dismisses substantially identical civil and criminal contempt petitions in a single order based on the court's construction of an antitrust decree, the court of appeals can, if it has jurisdiction to review the dismissal of the criminal contempt petition, entertain an appeal from the dismissal of the civil contempt petition.

3. Whether prosecution of the criminal appeal is barred by the doctrine of collateral estoppel if the court of appeals does not have jurisdiction to review the civil appeal in the above circumstances.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The double jeopardy clause of the Fifth Amendment and the statutory provisions are set forth at pp. 3-4 of the petition.

STATEMENT

Petitioner William B. Troy is the controlling stockholder and president of petitioners Martin Linen Supply Company and Texas Sanitary Supply Corp. On April 30, 1969, the United States filed a civil complaint charging each of the petitioners with restraints of trade in violation of the Sherman Anti-trust Act, 26 Stat.

209, as amended, 15 U.S.C. 1, *et seq.*, with respect to the business of furnishing linen supplies. A proposed consent decree, which was filed at about the same time as the complaint, was entered as a final judgment on June 2, 1969. Section V(A)(1) of the decree provided (Pet. App. 4a):

> Each corporate defendant is enjoined and restrained from, directly or indirectly:
>
> (A) Threatening, coercing, inducing or attempting to induce:
>
> (1) Any linen rental supplier to refrain, while in business, from furnishing linen supplies to any customer.* * *

On December 9, 1971, the United States filed virtually identical petitions for civil and criminal contempt charging that petitioners violated various provisions of the consent decree. Both petitions alleged that petitioners violated Section V(A)(1) by "threatening, coercing, inducing and attempting to induce competitors to refrain from soliciting business from linen supply customers of * * * [each corporate petitioner], by conducting retaliatory sales campaigns and threatening such campaigns as hereinafter described" (Pet. App. 19a). Other paragraphs of the petitions and pretrial discovery pleadings filed by the government "expanded and stated in [greater] detail" the threats and inducements which petitioners allegedly communicated to their competitors (*ibid.*).

On March 31, 1972, the petitioners filed an application for a construction of Section V(A)(1). They re-

cited the relevant paragraphs of the contempt petitions and stated: "Without admitting that they engaged in any of the above alleged conduct, Defendants claim that conduct such as that specified in the above-quoted paragraphs does not violate Section V(A)(1) as that Section is written" (J.A. 149).[1]

The district judge subsequently entered an opinion in response to that application (Pet. App. 18a-27a). He concluded that the language of Section V(A)(1) does not preclude the petitioners from attempting to induce their competitors to refrain from soliciting business from petitioners' customers (Pet. App. 23a-24a). On June 12, 1972, the district court entered an order dismissing the charges of violations of Section V(A)(1) in both petitions in accordance with that opinion. The district court also granted the government's request to dismiss the remaining counts without prejudice (Pet. App. 28a-29a).

The court of appeals reversed. It disagreed with the district court's construction of Section V(A)(1) and held that the facts alleged by the government constituted a violation (Pet. App. 12a-17a). The court of appeals also rejected petitioners' contention that an appeal by the government under the Criminal Appeals Act is barred because of prior jeopardy. It ruled that petitioners had not been placed in jeopardy at the time of the district court's pre-trial dismissal of the contempt petitions. Hence, further prosecution of petitioners on the criminal contempt charges was not prohibited by the double jeopardy clause, and an appeal

[1] "J.A." refers to the Joint Appendix in the court of appeals.

from the district court's order was authorized under the Criminal Appeals Act (Pet. App. 7a-8a).

The court of appeals also rejected petitioners' attack on its jurisdiction to review the dismissal of the civil contempt petition. While recognizing that such dismissal may under other circumstances be appealable only to this Court under the Expediting Act (Pet. App. 2a, 12a), it held that it has jurisdiction to review that dismissal in the particular circumstances of this case (Pet. App. 10a-12a).

ARGUMENT

1. The court of appeals correctly held that the district court's dismissal of the criminal contempt petition, before petitioners had been put on trial, did not prevent further prosecution by virtue of the double jeopardy clause and, accordingly, that it had jurisdiction to review the district court's dismissal under the Criminal Appeals Act.[2] This holding is but an application of the well-settled principle that a "defendant * * * [who] had not been put upon trial * * * had not been in jeopardy." *United States* v. *Celestine,* 215 U.S. 278, 283. Accord: *Illinois* v. *Somerville,* 410 U.S. 458, 467-468; *United States* v. *Jorn,* 400 U.S. 470, 479; *United States* v. *Blue,* 384 U.S. 251, 253; *Green* v. *United States,* 355 U.S. 184, 188; *Wade* v. *Hunter,* 336 U.S. 684, 688; *Collins* v. *Loisel,* 262 U.S. 426, 429-430;

[2] A prosecution for criminal contempt is a "criminal case" within the meaning of the Criminal Appeals Act. *United States* v. *Goldman,* 277 U.S. 229; *United States* v. *Sanders,* 196 F. 2d 895 (C.A. 10), certiorari denied, 344 U.S. 829; *United States* v. *Kelsey-Hayes Co.,* 476 F. 2d 265, 266 (C.A. 6).

United States v. *Brown*, 481 F. 2d 1035 (C.A. 8); *United States* v. *Pecora*, 484 F. 2d 1289 (C.A. 3).

Petitioners claim (Pet. 11-12) that if the judge had dismissed the case after trial commenced, further prosecution would have been barred even if the judge's action were based solely upon an erroneous interpretation of the decree. They contend that the same result should obtain if the ruling is made prior to trial. Petitioners fail to recognize, however, that the considerations underlying the double jeopardy clause's protection do not come into play until the trial has begun, *i.e.*, until petitioners have actually been placed in jeopardy of conviction at least once. "[T]he conclusion that 'jeopardy attaches' when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings." *United States* v. *Jorn*, *supra*, 400 U.S. at 480.[3] The critical inquiry is whether jeopardy had attached at the time of dismissal and not whether a dismissal on the same ground after jeopardy had attached would be appealable.

Despite the clear holdings of this Court defining the

[3] Moreover, the termination of a trial *after* jeopardy has attached does not always preclude appeal and further prosecution under the double jeopardy clause. Where, for example, a defendant deliberately delays raising a defense until jeopardy attaches, and then successfully moves to dismiss an indictment on grounds which could have been raised prior to trial (and as to which an adverse ruling could have been appealed by the government if so raised) an appeal by the United States would not appear to be barred by the double jeopardy clause. Compare *Illinois* v. *Somerville*, 410 U.S. 458.

point at which jeopardy is deemed to attach, there has been increasing conflict and confusion among the courts of appeals as to whether a pre-trial (and, under the traditional rule, a pre-jeopardy) dismissal of an indictment bars further prosecution and appeal under the double jeopardy clause. Some courts of appeals have held that a pre-trial dismissal of an indictment on the merits, based upon a consideration of evidence outside the indictment, is the equivalent of an acquittal, and that the double jeopardy clause bars an appeal from an acquittal even though jeopardy has never attached (see pp. 8-9, *infra*). Although, for reasons which are fully set out in our petition for certiorari in *United States* v. *Rothfelder,* No. 72-1473, certiorari denied, June 25, 1973,[4] we regard these holdings to be clearly erroneous; a reading of those cases indicates that there is no actual conflict among the courts of appeals regarding the appealability of a pre-trial dismissal order based on the sufficiency of the indictment (in this case the contempt petition) where, as here, the allegations in the indictment have merely been particularized by pre-trial discovery pleadings.

Such an order of dismissal would be appealable under the holdings of the Second, Third and Eighth Circuits. *United States* v. *Velazquez,* C.A. 2, No. 73-1869, decided December 28, 1973; *United States* v. *Pecora,* 484 F. 2d 1289 (C.A. 3); *United States* v. *Brown,* 481 F. 2d 1035 (C.A. 8). Indeed, the Court of Appeals for the Seventh Circuit has recently limited its *en banc*

[4] A copy of our petition for certiorari and reply memorandum in *Rothfelder* are being sent to counsel for petitioner.

construction of the same decree provision. The court of appeals correctly concluded that, had the government sought only criminal relief, the court of appeals would have jurisdiction under the Criminal Appeals Act, as amended, 18 U.S.C. 3731 (see, *supra*, p. 5, n. 2).[6] Had the government sought only *civil* relief, an appeal from the dismissal of a civil contempt proceeding in such circumstances would lie only to this Court under the Expediting Act. *Terminal R.R. Ass'n* v. *United States*, 266 U.S. 17, 28; *International Business Machines Corporation* v. *United States*, C.A. 2, Nos. 73-2126, 73-2127, 73-2145, 73-2146, decided December 17, 1973.[7] The court below, however, emphasized that it was not deciding whether it would have jurisdiction in such a situation. It said (Pet. App. 12a):

> Without deciding whether we would have jurisdiction to review the civil contempt proceeding were it standing alone or were it substantially different than the criminal petition, we hold that we have jurisdiction to review the dismissal under the facts of this case.

An appeal from the simultaneous dismissal of substantially identical civil and criminal contempt petitions to enforce an antitrust decree is unlikely to recur with any frequency. It is, therefore, not of sufficient importance to warrant plenary review. Moreover, the court of appeals decision is amply supported by three

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[6] Unless, of course, further prosecution is barred by the double jeopardy clause (see pp. 5-9, *supra*).

[7] Petitions for certiorari, extraordinary relief, and jurisdictional statement pending, Nos. 1064, 1065, 1066.

lines of cases: (1) Decisions based on considerations of economy, in which no independent ground of jurisdiction over auxiliary claims need be shown where the court has jurisdiction over the main claim (*e.g., Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 612-618; *Moore* v. *New York Cotton Exchange,* 270 U.S. 593); (2) decisions based on the policy of discouraging direct appeals to this Court in cases of overlapping appellate jurisdiction (*e.g., United States* v. *Swift & Co.,* 318 U.S. 442, 444-445);[8] and (3) cases involving a single order for civil and criminal contempt, in which this Court has held that the criminal aspect controls for purposes of determining the procedure on appeal (*e.g., Nye* v. *United States,* 313 U.S. 33, 42-43; *Union Tool Co.* v. *Wilson,* 259 U.S. 107, 110; *In re Merchants' Stock and Grain Co.,* 223 U.S. 639).

Petitioners are mistaken in asserting (Pet. 16) that the decision is in conflict with *Tidewater Oil Co.* v. *United States,* 409 U.S. 151, and *International Business Machines Corp.* v. *United States* 480 F. 2d 293 (C.A. 2), petition for a writ of certiorari pending, No. 72-1662. Those cases hold merely that the Expediting Act precludes review of an interlocutory order in a government civil antitrust action by any court prior to final judgment. Moreover, no criminal proceedings were involved in either case. See *International Business Machines Corporation* v. *United States, supra,* p. 10.

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[8] In cases such as *Swift* arising under the former Criminal Appeals Act, this Court required the courts of appeals to review both grounds of a district court decision notwithstanding that it rested on alternative grounds, one of which was appealable under the statute to this Court and the other to a court of appeals.

3. The final issue which petitioners seek to raise—that of "collateral estoppel"—is of no independent significance. It is based on the fact that the United States did not appeal to this Court from that portion of the order dismissing the civil contempt charge. Petitioners claim that *if* the petition for certiorari is granted to review *both* of the procedural issues they have raised, and *if* it should be held that the court of appeals had jurisdiction to review the dismissal of the criminal contempt charges but not the dismissal of the related civil contempt charges, then the failure of the United States to appeal the dismissal of the civil contempt charges should collaterally estop it from prevailing on the merits on its appeal from the dismissal of the criminal contempt charges.

We note that, if the issue regarding the jurisdiction of the court of appeals to hear the appeal from the dismissal of the criminal contempt charges is not found to warrant the issuance of a writ of certiorari, then the collateral estoppel issue would, as petitioners concede (Pet. 19), be eliminated. Moreover, petitioners' "collateral estoppel" claim is, in any event, insubstantial. As is evident from the cases cited by petitioners (Pet. 12), the estoppel doctrine relates to the effect of a judgment upon a *subsequent* proceeding and is designed to prevent relitigation of an issue decided in a *prior* proceeding. The doctrine has no application in the circumstances of this case, because there is no "prior" or "subsequent" proceeding. The district court proceeding was in substance a single proceeding, which culminated in a single order simultaneously dismissing the government's requests for criminal and civil relief.

The policy against relitigation does not require a litigant to appeal all aspects of a decision in order to appeal any part of that decision. Hence, the government's failure to appeal the denial of civil relief to this Court would not bar prosecution of the appeal from the denial of criminal relief, even if it were held that the court of appeals could in no event review the denial of civil relief.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

CARL D. LAWSON,
IRWIN A. SEIBEL,
Attorneys.

JANUARY 1974.

☆ U.S. Government Printing Office: 1974—530-543/153